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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE

TEXAS COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS, Appellant-Petitioner

v.

DAI'VONTE E'SHAUN TITUS ROSS, Appellee-Respondent

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS, CAUSE NUMBER, 04-00821-CR AND THE COUNTY COURT AT LAW NO. 15 OF BEXAR COUNTY, TEXAS, CAUSE NUMBER 519657

BRIEF FOR APPELLEE-RESPONDENT ON DISCRETIONARY REVIEW

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PANEL FOR THE 4TH COURT OF APPEALS	**The Honorable Sandee Bryan Marion**, Chief Justice **The Honorable Rebeca C. Martinez**, Justice **The Honorable Irene Rios**, Justice

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STATEMENT OF FACTS

Appellant (herein after referred to as "Petitioner" or "the State") charged Appellee (herein after referred to as "Respondent") with disorderly conduct by displaying a firearm in a public place. (1 C.R. at 7). The information provided:

> [O]n or about the 8th Day of June, 2016, DAI'VONTE E'SHAUN TITUS ROSS did intentionally and knowingly IN A MANNER CALCULATED TO ALARM, DISPLAY A FIREARM IN A PUBLIC PLACE, to wit: the 300 block of Ferris Avenue; against the peace and dignity of the State. (1 C.R. at 7).

Respondent timely filed and urged a pretrial Motion to Quash and Exception to Substance of Information. At the hearing on that motion, Respondent argued that the language of the charging instrument failed to provide him with adequate notice as to which act or acts allegedly committed by him are prohibited by law in

an open carry state. (1 R.R. at 6, 9, 11, 14). Respondent argued further that without such notice, he was unable to prepare a defense to the allegation. (1 R.R. at 9-11).

Petitioner responded that the manner and means Respondent sought was "evidentiary in nature," and that the State was not required to plead evidentiary matters in a charging instrument. (1 R.R. at 7). The State further argued that the instrument, as written, provided Respondent with adequate notice, and that it "absolutely speaks to the manner and means and how [the alleged] crime was perpetrated." (1 R.R. at 9). The trial court judge indicated he would allow the state time to amend the instrument before he granted Respondent's motion to set aside the information. (1 R.R at 11). Ultimately, the State indicated it would amend the instrument. (1 R.R. at 12). However, the State did not amend the instrument. The trial court granted the Respondent's motion to quash the charging instrument. The State appealed. On August 2nd, 2017 The court of appeals affirmed the trial court's order.

NO ERROR

The trial court did not err in granting the motion to quash because the charging instrument did not provide sufficient notice of the alleged offense by simply tracking the language of the statute, because the statute was not completely descriptive of the offense.

ARGUMENT

Standard of Review

"The sufficiency of a charging instrument presents a question of law." *Smith v. State*, 309 S.W.3d 10, 14 (Tex. Crim. App. 2010); see also *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008). "An appellate court therefore reviews a trial judge's ruling on a motion to quash a charging instrument *de novo*." *Id.*

Applicable Law

When a challenge to an accusation for failure to provide adequate notice on which to prepare a defense is properly and timely asserted with adequate statement of the manner in which notice is deficient, "fundamental constitutional protections are invoked." *See Brasfield v. State,* 600 S.W.2d 288 (Tex.Cr.App.1980); *Moore v. State,* 532 S.W.2d 333 (Tex.Cr.App.1976), *Voelkel v. State,* 501 S.W.2d 313 (Tex.Cr.App.1973); *Adams v. State, supra*, citing *Bonner v. State,* 640 S.W.2d 601 (Tex. Crim. App.1982); *Coleman v. State*, 643 S.W.2d 124 (Tex. Crim. App. 1982). Moreover, Art. I, Sec. 10 of the Texas Constitution mandates that the notice petitioned for must come from the face of the charging instrument. *Brasfield v. State,* 600 S.W.2d 288 (Tex.Cr.App.1980); *Moore v. State,* 532 S.W.2d 333 (Tex.Cr.App.1976), *Voelkel v. State,* 501 S.W.2d 313 (Tex.Cr.App.1973). The adequacy of the allegation must be tested by its own terms

"in a vacuum, so to speak." *Adams v. State, supra*, citing *Bonner v. State,* 640 S.W.2d 601 (Tex. Crim. App.1982).

The Charging Instrument Must Give Sufficient Notice of the Alleged Offence in Plain and Intelligible Words Such that a Person of Common Understanding May Know the Offense He is Alleged to Have Committed with Enough Specificity So That He May Adequately Prepare a Defense.

Both the U.S. Constitution and the Texas Constitution guarantee an accused the right "to be informed of the nature and cause of the accusation" against him. U.S. CONST., AMEND. VI.; TEX. CONST. Art. I, § 10. An indictment accuses the named person of an "act or omission which, by law, is declared to be an offense." Tex. Code Crim. Proc. Ann. Art. 21.01. Thus, a motion to quash is properly granted "where the language concerning the defendant's conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed" *Daniels v. State*, 754 S.W.2d 214, 220 (Tex. Crim. App. 1988); *see also Thomas v. State*, 621 S.W.2d 158, 163. The underlying principle is that the purpose of an indictment is to fully apprise the defendant of the crime with which he is charged so that he may properly prepare his defense. *United States v. Farinas*, 299 F. Supp. 852, 854 (S.D.N.Y. 1969). A challenge to the indictment "calls for examination of the criminal accusation from the perspective of the accused." *Adams v. State*, 707 S.W.2d 900, 901 (Tex. Crim. App. 1989)

Because the charging instrument must give the defendant sufficient notice to allow him to prepare a defense, *Curry v. State,* 30 S.W.3d 394, 398 (Tex. Crim. App. 2000), a charging instrument must "charge the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged and enable the court, on conviction, to pronounce the proper judgment…", Tex. Code Crim. Pro. Ann. Art. 21.11, and the charging instrument must be "set forth in plain and intelligible words." Tex. Code Crim. Proc. Ann. Art. 21.02(7). Additionally, it must possess "[t]he certainty…such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." Tex. Code Crim. Proc. Ann. Art. 21.04. A charging instrument that is not alleged in plain and intelligible words such that a person of common understanding may know the offense(s) he is alleged to have committed, is insufficient to give notice to a defendant of the charged offense and, as such, does not adequately provide notice for the defendant to prepare a defense.

"Everything should be stated in an indictment which is necessary to be proved." Tex. Code Crim. Pro. Ann. Art. 21. 03. A charging instrument that simply tracks statutory language may be insufficient to provide a defendant with adequate notice. *Barbernell*, 257 S.W.3d at 252. Specifically, tracking of the

language of the statute may be insufficient if the statutory language is not completely descriptive. *Id.*

A statute is not completely descriptive when it uses "an undefined term of indeterminate or variable meaning." *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998). Additionally, the statutory language is not completely descriptive when the statutes defines a term in such a way as to create several means of committing an offense, and the definition specifically concerns an act or omission on the part of the defendant, that is, when the statutory language fails to be completely descriptive of the conduct prohibited. *Barbernell*, 257 S.W.3d at 252.

In such instances, more particularity is required to provide notice. *DeVaughn v. State*, 749 S.W.2d 62, 69 (Tex. Crim. App. 1988); *Barbernell*, 257 S.W.3d at 251; *see also Olurebi v. State*, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994) (noting that if the statutory language is not completely descriptive of the offense, then additional specificity will be required in the face of a timely motion to quash); *State v. Jarreau*, 2017 Tex. Crim. App. LEXIS 210, No. PD-0840-16 (March 1, 2017) (holding that an indictment that tracks the language of a statute usually gives sufficient notice, but this rule applies only where the pleading is framed under a statute which defines the act constituting the offense in a manner that will inform the accused of the nature of the charge.)

Response to Petitioner's First Ground for Review: Tracking the Statutory Language Does Not Provide Sufficient Notice Because the Instrument Contains Undefined Terms of Indeterminate or Variable Meaning.

Respondent concedes that the charging instrument tracked the language of the statute; however, in this case, the language of the statute is not completely descriptive of the charged offense. The State charged Respondent under Tex. Penal Code §42.01(a)(8). That statute reads: "a person commits an offense if he intentionally or knowingly displays a firearm or other deadly weapon in a public pace *in a manner calculated to alarm*." (Emphasis added). A statute is not completely descriptive when it uses "an undefined term of indeterminate or variable meaning." *Mays*, 967 S.W.2d at 406. Both the 5th Circuit and Texas courts have repeatedly held that the term "alarm" is an undefined term of indeterminate or variable meaning. *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983); *May v.* State, 765 S.W.2d 438, 440 (Tex.Crim.App. 1989); *Edmond v. State*, 933 S.W.2d 120 (Tex.Crim.App. 1996) (upholding trial court's granting of motion to quash indictment because "mistreatment" is not distinguishable from "alarm," which term was previously held to be unconstitutionally vague); *Scott v. State*, 298 S.W.3d 264 (Tex.App.-San Antonio 2009) (rev'd on other grounds).

In fact, in *Kramer*, the term "alarm" was found to be "inherently vague." Because of the inherent vagueness of the term "alarm," the State was required to allege, with specificity, the manner and means in which Respondent's conduct was

"calculated to alarm." The State failed to do so, and Respondent was thereby deprived of notice sufficient to allow for the adequate preparation of his defense.

Neither the Statute Nor the Charging Instrument Provide Notice as to What Conduct is Prohibited by Law

Respondent has not challenged Petitioner's failure to allege a specific complainant in the information. However, neither the information, nor the statute, provides any notice as to which party, in general, Respondent's alleged conduct was "calculated to alarm." Tex. Penal Code § 42.01(a)(8) does not provide any guidance as to the standard from which Respondent conduct is to be judged. Moreover, despite agreeing to amend the instrument, Petitioner subsequently declined to provide any additional clarity. Specifically, the statute at issue does not specify the distinction between lawful open carry of a firearm and displaying in a manner calculated to alarm. Respondent has no notice as to at what point, or in what way, he is alleged to have displayed a firearm in a manner calculated to alarm. Consequently, Respondent is unable to prepare a defense.

The Charging Instrument Must Allege a Particular Manner and Means Because the Statute Condemns an Entire Species of Conduct

Texas is an open-carry state. *See generally* Texas Local Government Code, Chapter 411; subchapter H, Texas Penal Code 46.02. Texas law therefore, in general, does not prohibit the display of a long gun in a public place. District Courts have observed that, "[w]here an indictment condemns an act belonging to a

species of conduct, which species includes other acts not amounting to indictable offenses, it is not sufficient that the indictment merely identifies the species in general but, rather, it must particularize the act or acts which, it is alleged, constitute the offense charged so that the court can be assured that the indictment charges conduct which is, in fact, prohibited by law..." *United States v. Farinas*, 299 F. Supp. 852, 854 (S.D.N.Y. 1969). The 5th Circuit has not rejected this argument. See generally *U.S. v. Diecidue*, 603 F.2d 505 (5th Cir. 1979); *U.S. v. Johnson*, 476 F.2d 1251 (5th Cir. 1973).

Without a Particularized Manner and Means Respondent has No Notice as to How His Conduct was Unlawful

Because Tex. Penal Code §42.01(a)(8) condemns an entire "species of conduct," that is, the display of a firearm in a public place, the charge must descend into particulars. This statute condemns not simply a species of conduct which *also* contains within it lawful conduct, but a species which contains within it *mostly* lawful conduct. Consequently, the State must provide Respondent with notice as to how his conduct was distinguishable from conduct of the same species which is not prohibited by Texas law. Because the charge does not do so, Respondent was not provided with notice sufficient to prepare his defense. Further, due to the aforementioned defect, the charge did not satisfy the Texas Code of Criminal Procedure, The Texas State Constitution or the United States Constitution.

The Charging Instrument Did Not Give Sufficient Notice of the Alleged Offense in Plain and Intelligible Words Such that a Person of Common Understanding May Know the Offense He is Alleged to Have Committed with Enough Specificity So That He May Adequately Prepare a Defense.

In its brief the State has argued that this case is comparable to *Roberts v. State*, No-01-16-0059-CR, 2016 Tex. App. LEXIS 12598 (Nov. 29 2016), an opinion from the 1st Court of Appeals, not recommended for publication. However, *Roberts* is distinguishable from this case. While *Roberts* deals with the same statute as the instant case, *Roberts* is a constitutional challenge. The issue before this Court is the sufficiency of the notice provided by the charging instrument. Additionally, Petitioner relies on *Roberts* as authority for the proposition that it need not allege a specific victim. However, Respondent did not argue before the trial court or the court of appeals that the absence of a particularized victim is a defect of notice in this case. And Respondent does not raise that argument here.

Petitioner also contends that the charging instrument in the instant case provides more notice than the instrument at issue in *Roberts*, because this instrument provides a physical address, whereas the charging instrument in *Roberts* did not. However, Respondent has not argued that the lack of a physical address would be fundamental to notice. Respondent did not challenge the lack of a

physical address in the charging instrument before the trial court or the court of appeals. Respondent does not do so here.

Similarly, the Petitioner relies on *Ex Parte Poe*, a 9th Court opinion from which Petitioner conflates constitutional vagueness with sufficiency of the charging instrument. *Ex Parte Poe*. 491 S. W. 3d 348 (Tex. App. –Beaumont 2016, pet. ref'd). In *Poe*, the defendant challenged a statute as facially unconstitutional in every application. This case is distinguishable from *Poe*. In fact, Petitioner concedes the distinction, yet relies on the *Poe* opinion as "instructive" authority. *Poe* is not binding authority on this Court.

Petitioner Asks This Court to Construe the Language "Calculated to Alarm" as Synonymous with "With Intent to Cause Alarm."

Petitioner contends that "there is no discernable difference between the phrases "in a manner calculated to alarm" and "within (sic) intent to cause alarm" . . . " (Petitioner's Brief on the Merits at 15). But the Texas Supreme Court has found that the terms "calculated" and "intended" are *not* synonymous: ". . . the fact that three of the seventeen other states with disciplinary rules modeled on the same source as Rule 3.06(d) have replaced the word "calculated" with "intended" supports the conclusion that those terms are not synonymous." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 439 (Tex. 1998).

Relying on the proposition that the phrase "calculated to alarm" is synonymous with the phrase "with intent to cause alarm," Petitioner argues that the

charging instrument in the instant case provides sufficient notice because "calculated to alarm" is an *additional* intent requirement beyond the "general intent or knowledge required by subsection (a)" (Petitioner's Brief on the Merits at 20). The 5th Circuit has expressly rejected the argument Petitioner appears to be making before this Court—that an additional intent requirement cures vagueness respecting conduct and applicable standards by which conduct is assessed:

> "The State maintains that the Texas Harassment Statute is restricted to individuals who act with an intent to annoy. An intent requirement, it contends, ensures that the actor will have fair notice that his contemplated conduct is forbidden. We disagree. *Specifying an intent element does not save § 42.07 from vagueness* because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague.

Kramer v. Price, 712 F.2d 174, 178 (5th Cir.1983) (emphasis added).

Next, Petitioner analyses Texas Penal Code §42.01(a)(8) with respect to elements as defined by Texas Penal Code §1.07(22), which reads as follows:

> "Element of offense" means:
>
> (A) the forbidden conduct;
>
> (B) the required culpability;
>
> (C) any required result; and
>
> (D) the negation of any exception to the offense.

Petitioner asserts: "[t]he display of the firearm is the "forbidden conduct and the "manner calculated to alarm" is the "required culpability." (Petitioner's Brief

on the Merits at 20). But this conduct is alleged in Texas. The display of a firearm in public is not "forbidden conduct." As courts of appeals have observed, "[b]ecause Texas is an open-carry state, an individual is entitled to openly display a firearm in public." *State v. Ross*, 531 S.W.3d 878, 880 (Tex. App.—San Antonio 2017, pet. granted); *Lovett v. State*, 523 S.W. 3d 342 (Tex. App.—Fort Worth 2017, pet. filed). Petitioner avoids entirely the implications of open-carry in Texas. Moreover, Petitioner's argument truncates § 1.07(22) omitting §1.07(22)(D) entirely. That subsections requires "the negation of any exception to the offense." In Texas, the "negation" of this offense is not the exception—it is the rule. The charging instrument must therefore provide Respondent with notice as to how his conduct is differentiable from open-carry conduct that is not prohibited by Texas law.

Petitioner correctly observes that tracking the statutory language in a charging instrument is insufficient "when the statute defines a term in such a way as to create several means of committing an offense . . ." *Solis v. State*, 787 S.W.2d 388, 390 (Tex. Crim. App. 1990). But Petitioner then crafts an extensive list of the various manners in which Respondent *might* have violated 42.01(a)(8) such as through" the circumstances of the public place and the physical way [Respondent] manipulated the firearm [or] perhaps the state could rely on the testimony of an alarmed observer...[or Respondent] could wave a gun in the air in the middle of a

crowded plaza . . . he could discretely flash it to a particular individual whom he has a motive to harass . . .” (Petitioner’s Brief on the Merits at 20-21).

Despite these numerous alternative methods, Petitioner concludes “there are no alternative methods to commit this crime because the actor must invariably display a firearm in a manner calculated to alarm.” (Petitioner’s Brief on the Merits at 20-21). While 42.01(a)(8) does not expressly spell out alternative methods of committing an offense, its use of the inherently vague term “alarm” implies alternatives via the “variable and indeterminate meaning” of that term. Because there are alternative methods, the charging instrument in the instant case required greater specificity than simply tracking the statute. Without greater specificity, Respondent was deprived of notice sufficient to prepare his defense.

Finally, Petitioner observes, “when the prosecution fails to give proper notice through its charging instrument, it may be cured by amendment and the criminal case may proceed if the defendant can prepare his defense. . . If the charging instrument is amended, no violation occurs.” (Petitioner’s Brief on the Merits at 19). This is precisely the reason the trial court, after indicating it was inclined to grant Respondent’s motion to set aside the information, allowed Petitioner leave to amend the charging instrument. (1 R.R. at 11). However, Petitioner did not amend the instrument. Accordingly, Respondent has been deprived of sufficient notice and has been unable to prepare his defense.

For the foregoing reasons, the answer to Petitioner's first ground for review is that the charging instrument in the case at bar does not provide sufficient notice to Respondent.

Response to Petitioner's Second Ground for Review: The Court of Appeals Did Not Apply a First Amendment Rule to a Sixth Amendment Complaint

Petitioner reads the lower court's holding as follows: "The court of appeals focused on the word "alarm," concluding that the trial court correctly granted [Respondent's] motion to quash because "[c]onduct that [alarms] some people does not [alarm] others." (Petitioner's Brief on the Merits at 14). But this description does not accurately characterize the lower court's holding. That court said:

> "[W]e hold tracking the language of section 42.01(a)(8) in an information is not sufficient notice because the statute "uses an undefined term of indeterminate or variable meaning," thereby requiring "more specific pleading in order to notify the defendant of the nature of the charges against him…"

State v. Ross, 531 S.W.3d 878 (Tex. App.—San Antonio 2017, pet. granted) (citing *Mays v. State*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998).

The record in the instant case does not support Petitioner's contention that the court of appeals applied a "First Amendment rule to a Sixth Amendment complaint." Instead, the court of appeals reviewed cases that interpret the word

"alarm" in Texas and federal jurisprudence. The appeals court did not apply a First Amendment rule in order to reach its holding. Having determined that the word "alarm" has an indefinite and variable meaning, the lower court applied a Sixth Amendment "rule" which holds that the presence of such a term in a statute requires greater specificity in the charging instrument. *Ross*, 531 S.W.3d at 883-84.

Petitioner cites no authority for its contention that federal and Texas courts' determinations that the term "alarm" is inherently vague are limited to First Amendment analyses. Petitioner cites no authority for its proposition that the court of appeals applied a "First Amendment rule" in order to reach its holding. The Fourth Court of Appeals did not err by "applying a First Amendment rule to a Sixth Amendment complaint" because that court did not apply a "First Amendment rule."

Response to Petitioner's Third Ground for Review: "Alarm" is an Undefined Term of Indeterminate or Variable Meaning

Petitioner argues that the court of appeals' holding that alarm is an undefined term of indeterminate or variable meaning is "wrong because it focuses on a result that is not required by [42.01(a)(8)]." (Petitioner's Brief on the Merits at 25). A careful reading of the opinion from the lower court does not provide support for Petitioner's proposition that the court of appeals "focused on" or otherwise required a result in finding the term alarm to be inherently vague. Rather, the court of appeals relied on precedent from this Court and federal courts which have held

the term "alarm" to be vague. Petitioner then asserts that the Fourth Court of Appeals' holding was "also wrong because it relies on case law interpreting statutes that implicate free speech as opposed to conduct." *Id*.

Petitioner asks this Court to rely on *Colten v. Kentucky*, 402 U.S. 104 (1972) and *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), instead of the authority cited by the court of appeals. But the vagueness of the word "alarm" was not raised in *Colten* and was not reached in *Scott*. While the statute at issue in *Colten* contains the word "alarm," it also contains a requirement that a person charged under that statute "refuses to comply with a lawful order of the police to disperse." *Colten* 407 U.S. at 108. Moreover, in order to violate that statute a person must intent to "cause public inconvenience, annoyance *or* alarm. *Id.* (Italics added). Texas Penal Code 42.01(a)(8) neither includes the term "alarm" as one among others in a disjunctive list of alternatives, nor does it contain any requirement that a person refuse to comply with a lawful order from police. If 42.01(a)(8) did contain such additional specificity, the notice provided by a charging instrument tracking that statute could well be sufficient to enable a defendant to prepare his defense.

The above reasoning applies with more force to *Scott*. The statute at issue in *Scott* was Texas Penal Code §42.07. *See Scott v. State*, 322 S.W.3d 662, 664 (Tex. Crim. App. 2010). The defendant in *Scott* was charged twice by information. *Id* at 665. The charging instruments read, in relevant part:

"with intent to harass, annoy, alarm, abuse, torment, and embarrass [complainant], [defendant] did make repeated communications to the complainant, to wit: telephone calls, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant."

and,

"with intent to harass, annoy, alarm, abuse, torment, and embarrass [complainant], [defendant] did make repeated telephone communications to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant, to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages." *Id.*

In each instrument, the word "alarm" is again one among others in a disjunctive list of alternative specific intents. More importantly, the prohibited conduct is described with significantly more specificity than that provided by the charging instrument in the case at bar. This Court held that the statute in *Scott* was not unconstitutionally vague because in order for a violation to occur, a person must "with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress." *Id.* at 669-70. The "manner" in

Scott is readily amenable to description without recourse to terms this Court has previously determined to be vague.

Like *Colten*, a charging instrument tracking the statute at issue in *Scott* does not suffer from the same insufficiency of notice as the instrument Respondent complains of here. Therefore even if this Court agrees with Petitioner that *Colten* and *Scott* are the appropriate authorities to consider in determining the sufficiency of the instrument in this case, neither opinion alters this Court's precedents on the vagueness of the word "alarm." *See May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989); *Long v. State*, 931 S.W. 285 (Tex. Crim. App. 1996). Alarm is vague in the context of 42.01(a)(8) because nothing in 42.01(a)(8) serves to remove the vagueness of the term. Displaying a firearm in public is not prohibited conduct, even when done intentionally or knowingly, and the term "calculated" is but another undefined term. *Ex Parte Poe*, 491 S.W.3d 348, 350 (Tex. App. -- Beaumont 2016, pet. ref'd); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 439 (Tex. 1998).

Unlike *Colten* and *Scott*, a charging instrument tracking the language of 42.01(a)(8) remains insufficient because the vagueness of alarm is not cured by surrounding specificity such as "refusing a lawful order to disperse" or a manner and means such as, "to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail

messages." *See Colten v. Kentucky*, 402 U.S. 104 (1972); *See Scott v. State*, 298 S.W.3d 264 (Tex. App. -- San Antonio 2009).

To assume any reasonable person knows what not to do under section 42.01(a)(8), and any reasonable defendant knows what he is accused of when his official accusation tracks the language of this law is to beg the question. To merely assume a citizen has notice in this circumstance ignores the presumption of innocence that protects his due process rights. *DeVaughn v. State*, 749 S.W.2d 62, 68 (Tex. Crim. App. 1988).

The problematic vagueness of the word alarm is illustrated by Petitioner: "A person may peaceably carry a holstered pistol or slung rifle in public all day long without committing a crime . . .[b]ut they may not display the firearm with the intent of causing fear [alarm] among the public." (Petitioner's Brief on the Merits at 27). If petitioner is correct, a person passes from lawful conduct into prohibited conduct solely by the operation of his or her mind. The term alarm does nothing to clarify the prohibited conduct. A person is not put on notice by an instrument tracking the language of 42.01(a)(8) because a person cannot tell what conduct is alleged to have evinced his or her culpable intent. Consequently, the term "Alarm" is vague in the context of 42.01(a)(8).

Conclusion

The charging instrument in this case failed to provide Respondent with sufficient notice. Though the language of the instrument tracked the language of the statute under which Respondent was charged, the statute is not completely descriptive of the offense alleged. Therefore, the charging instrument required particularity. Because it lacked such particularity, the instrument did not provide sufficient notice.

The Fourth Court of Appeals did not apply a First Amendment rule in affirming the trial court's order granting Respondent's motion to set aside the information and therefore did not err.

The term alarm is at least as vague in the context of Texas Penal Code §42.01(a)(8) as it is in the context of the other statutes using the same term this Court, the Court of Appeals for the 5th Circuit, and the United States Supreme Court have reviewed. The term alarm is inherently vague.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that this Court affirm the decision of the Fourth Court of Appeals and the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Mac Bozza, hereby certify that the total number of words in this Respondent's brief is approximately 4825 words, according to Microsoft Word Count, excluding the cover page, identity of parties, table of contents, index of authorities, certificate of service, and certificate of compliance, in accordance with the Texas Rules of Appellate Procedure 9.4(i)(2)(D) and 9.4(i)(3). I also certify that a true and correct copy of the above and forgoing brief was delivered to Nathan Morey, attorney for Appellant-Petitioner, through the e-file e-service on April 12th, 2018.

/s/ Mac Bozza

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Mac Bozza
Attorney for Respondent